UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

TGF MANAGEMENT GROUP HOLDCO, INC.

and Case No. 22-CA-123003

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 469

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for the General Counsel
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California, for the Respondent
Frederick Potter for the Charging Party

DECISION

Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case No. 22-CA-123003, filed on February 21, 2014, by International Brotherhood of Teamsters, Local 469 ("Local 469" or "the Union"), a Complaint and Notice of Hearing (the "Complaint") issued on June 27, 2014. The Complaint alleges that TGF Management Group Holdco, Inc. ("TGF" or "Respondent"), violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union regarding the discharge of employee Imber Espinosa. Respondent filed an Answer denying the Complaint's material allegations. This case was tried before me on September 9, 2014, in Newark, New Jersey.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the arguments of the parties made at trial and in their post-hearing briefs, I make the following

Findings of Fact

I. Jurisdiction

At all times material to the complaint's allegations, Respondent has been a corporation with an office and place of business in Carteret, New Jersey, engaged in the business of warehousing and providing third-party logistics services. Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Respondent admitted at the hearing and I find that at all material times Local 469 has been a labor organization within the meaning of Section 2(5) of the Act.

[1] On August 8, 2014, Respondent filed a Motion for Summary Judgment in this matter, which was denied by Order of the Board dated September 12, 2014.

II. Alleged Unfair Labor Practices

A. Respondent's Operations and The Collective Bargaining Relationship

Respondent is a logistics service provider, consisting of a freight forwarding division (Toll Global Forwarding) and a trucking and warehousing division based in Carteret, New Jersey. The trucking and warehousing division picks up freight specified by customers from piers and distribution centers, and delivers the freight to requested locations. Michael DiVirgilio is Respondent's Director of East Coast Operations, and oversees the local and regional trucking divisions. DiVirgilio reports to Brian Southwell, who was at that time of the events at issue here the Vice President of East Coast Operations, and to Fran Castro, the Senior Director of Trucking Services. Richard Pacheco is TGF's Vice President of Human Resources and Safety and Security, and reports to Myles O'Brien, the company's CEO. Respondent admits and I find that at all material times DiVirgilio and Pacheco were supervisors within the meaning of Section 2(11) of the Act, and agents of Respondent acting on its behalf within the meaning of Section 2(13). DiVirgilio and Southwell testified at the hearing. Lucille Waldrip, TGF's Director of Human Resources, and Lauren Wojcik,[2] a Human Resources Supervisor, also testified at the hearing for Respondent.

Respondent employs both local and regional drivers at its Carteret facility. Local drivers are paid by the hour, based upon an hourly rate. Regional drivers generally drive routes involving a distance of over 100 miles from the Carteret facility, and are paid based upon their route. Drivers typically communicate with the dispatchers and with one another using the Calcaum system, and also use their cell phones for calls and text messages.

Michael Potter is Local 469's President and Business Manager, and Elliott Reyes, a regional driver employed by TGF, has been a Union shop steward since September 2013.[3] Potter and Reyes both testified at the hearing for General Counsel. On July 29, 2013, the Board certified Local 469 as the exclusive collective bargaining representative of the employees in the following unit:

> All full-time and regular part-time Long-Haul Drivers, Truck Drivers and Switchers employed by the Employer at its Carteret, New Jersey facility, but excluding all Office Clerical employees, Managers, Guards and Supervisors as defined in the Act, and all other employees.

Respondent admits and I find that the bargaining unit described above is appropriate within the meaning of Section 9(b) of the Act, and that since July 29, 2013, Local 469 has been the exclusive collective bargaining representative of the unit employees pursuant to Section 9(a). Respondent further admits and I find that since that time TGF has been engaged in negotiations with Local 469 for an initial collective bargaining agreement. Potter testified that negotiations began in August 2013, and take place once or twice each month. While the parties have reached tentative agreements, there was no overall collective bargaining agreement in place at the time of the hearing. Nor have the parties agreed on an interim grievance procedure for the resolution of disputes.

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[2] At the time of Espinosa's discharge, Wojcik's surname was Klaver.

[3] Before his employment with TGF, Reyes served as a shop steward for 14 years at a previous company.

B. Respondent's Disciplinary Policies

Respondent maintains an Employee Handbook of Company Policies, effective by its terms as of January 1, 2013. The Employee Handbook contains the following provisions:

> Employee Conduct and Work Rules
>
> To ensure orderly operations and provide the best possible work environment, Toll expects you to follow rules of conduct that will protect the interests and safety of all employees and the Company.
>
> It is not possible to list all the forms of behavior that are considered unacceptable in the workplace. The following are some examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment. These behaviors include, but are not limited to:
>
> …
>
> - Excessive absenteeism or any absence without notice
> - Unauthorized absence from your work station during the work day
>
> …
>
> - Violation of personnel policies
> - Unsatisfactory performance or conduct
> - Violation of Company rules or general rules of acceptable condut and performance
>
> There is no guarantee of any specific steps being followed and the severity of the conduct and the factual circumstances surrounding any violation will determine the appropriate disciplinary action. Furthermore, this policy in no way alters or modifies Toll's at-will employment policy, and employment with Toll is at the mutual consent of Toll and the employee, and either party may terminate that relationship at any time, with or without cause, and with or without advance notice.
>
> G.C. Ex. 4, p. 11.

The Employee Handbook also contains specific provisions addressing employee attendance and punctuality. Respondent does not contend that Imber Espinosa, who is the subject of the Complaint's allegations, was discharged pursuant to the attendance and punctuality portion of the Employee Handbook.

Waldrip confirmed that the language quoted above constituted an accurate account of TGF's disciplinary policy. In addition, DiVirgilio testified that, consistent with the statement, "the severity of the conduct and the factual circumstances surrounding any violation will determine the appropriate disciplinary action," he considered mitigating circumstances in order to decide on a penalty in situations involving a driver's refusal to work or request for a different assignment.

C. The January 16, 2014 Discharge of Imber Espinosa

Imber Espinosa was a regional driver employed out of Respondent's Carteret facility. DiVirgilio testified that on January 16, 2014,[4] he arrived at work at about 8 a.m., and was contacted almost immediately by dispatch manager Mike Drew, who informed him that Espinosa had not reported to work on January 14, 15, or 16. According to DiVirgilio, Drew also stated that he had communicated with Espinosa via text messages, and that he had warned Espinosa that if Espinosa refused work a write-up would ensue. DiVirgilio asked Drew to send him the relevant text messages, and then called dispatcher Gerry Daley, asking Daley to provide his text messages with Espinosa as well. DiVirgilio received the text messages from Drew almost immediately, and received text messages from Daley within 15 minutes. The text messages, all from Wednesday, January 15, read as follows:

Wednesday 2:34 PM

Espinosa: Hey can u check if my truck is in the shop

Daley: There extension is 264 we have other tractors you can drive

Espinosa: ok sorry but I not going to call them

Daley: Why not?

Espinosa: Because they usually call the dispatch for available truck

Daley: We have a truck for you

Wednesday 5:41 PM

Espinosa: Sorry man I was busy but anyway I'm going to take the day off

Daley: You have to call one of us at dispatch and let us know early on in the day you can't just not show up

Espinosa: Ok next time

Wednesday 8:09 PM

Daley: I need you to start <u>at 5 am</u> for a curtisbay and a pickup at Hanover

Espinosa: Sorry I can't do that trip

Daley: Why not?

Espinosa: I don't like this trip that's like 14 hours for $189 no way

Wednesday 8:50 PM

Drew: Al, you need to answer why you are refusing the load I have assigned for you tomorrow. If you don't show up <u>at 5:00 a.m.</u> I will consider this a refusal by you to work tomorrow.

[4] All subsequent dates are in 2014 unless otherwise indicated.

Espinosa: Well mike u know I don't like to say no but that trip I don't like and I'm not refusing but if you think I'm refusing I respect that

Drew: Al, we need you to work, you get paid for the extra stop plus the miles. Again, I need you for this run and if you don't come in for it you will be written up for refusing work.

Espinosa: Question is my truck ready for tomorrow

Drew: Hello, I am currently driving. Please wait until I can safely stop then I will read your message and get back to you. Thank you

Wednesday 10:31 PM

Daley: 3106 is not out of service it's good to go

Espinosa: Ok

Wednesday 11:48 PM

Daley: So are you coming in <u>at 5 am</u>[5]

After reviewing the text messages, DiVirgilio called Pacheco, and discussed Espinosa's conduct, as described in the text messages and by the dispatchers. DiVirgilio recommended to Pacheco that Respondent proceed with the discharge of Espinosa.[6] Pacheco agreed, and directed DiVirgilio to begin the process of meeting with Reyes and Espinosa. Southwell testified that DiVirgilio called him as well, and informed him that a driver had refused to report for work as instructed "on several occasions," and "had refused to show up." According to Southwell, DiVirgilio stated that text messages constituted most of the communications pertinent to the incident. Southwell testified that he told DiVirgilio to make sure to contact Human Resources, and DiVirgilio responded that he had already spoken with Pacheco. Southwell also told DiVirgilio to make sure that the secretary was present if he met with the driver.

Subsequently, DiVirgilio had a "brief" and "informal" discussion with Southwell and Waldrip. DiVirgilio told Southwell and Waldrip about Espinosa's conduct, and reported that Pacheco had agreed with his recommendation that Espinosa be discharged. DiVirgilio testified that Southwell and Waldrip agreed that Espinosa should be discharged, and that he told them that he would proceed to contact Reyes and Espinosa. Southwell testified that he ran into DiVirgilio while speaking with the Research Department, and they then met with Waldrip to discuss Espinosa. According to Southwell, DiVirgilio told them that Espinosa had refused work twice and had failed to report, and Waldrip had confirmed that drivers had been discharged for

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[5] R.S. Ex. 1 (emphasis in original). Minor errors in spelling which do not appear to be common usages in the context of text messaging have been corrected for clarity.

DiVirgilio testified that his conversations with Daley and Drew and his review of the text messages constituted his investigation into Espinosa's refusal of work and/or no call no show.

[6] DiVirgilio testified that he does not have the authority to discharge employees. Instead he makes recommendations to Pacheco, who has the authority to make the decision regarding discharge. Southwell, however, testified that DiVirgilio's disciplinary recommendations are "almost always followed."

such conduct in the past.[7] Southwell testified that "we believed that [discharge] was justified," and that the next step was to meet with the driver, with the Union's shop steward and a Human Resources representative present. Waldrip also confirmed that the meeting was brief and informal, and testified that DiVirgilio and Southwell informed her that Espinosa had refused to work and called out two days in a row. Waldrip testified that she would have confirmed that employees had been discharged in the past for refusing to work, but stated that she did not voice an opinion as to whether Espinosa in particular should be terminated.

DiVirgilio testified that some time between 8:00 and 9:00 a.m., he called Reyes at home, and "let him know that we were going to terminate [Espinosa] for refusal to work." DiVirgilio testified that he proceeded to describe Espinosa's conduct to Reyes, and asked Reyes to come to his office for a meeting. Reyes, however, testified that DiVirgilio initially called him shortly after 10 a.m. when he was in the drivers' lounge watching a television program which had just begun.[8] According to Reyes, DiVirgilio said that he "had to terminate a driver," and asked him to come to the office. Reyes testified that he asked DiVirgilio the reason for the discharge, and DiVirgilio told him that the driver had refused to work and had been no call/no show. Reyes said that he would be right over.

DiVirgilio and Reyes then met in DiVirgilio's office. Reyes testified that when he entered the office, DiVirgilio told him that he "was terminating a driver," and handed Reyes a Termination Notification. According to Reyes, when DiVirgilio gave him the Termination Notification, it was not signed, but had the handwritten statement in the Comments section, "Refusal to work on 1/16/14 no call/no show 1/15/14" (G.C. Ex. 2). Reyes asked for a moment to speak with Espinosa, and DiVirgilio agreed, stating that he would call someone from Human Resources down. Reyes also asked DiVirgilio if the company would consider a suspension. Reyes testified that during this meeting he did not tell DiVirgilio that he agreed with the reason DiVirgilio gave for Espinosa's discharge, and DiVirgilio did not discuss the text messages. DiVirgilio testified that he told Reyes that Espinosa had refused to work, which was Respondent's "reason for proceeding with termination." However, DiVirgilio contended that he also showed Reyes the text messages at this meeting, and that Reyes agreed that discharge was appropriate because Espinosa had refused to work.

Reyes then met with Espinosa and discussed the allegations with him. Espinosa told Reyes that Daley had called him and sent him text messages on Wednesday, January 15, regarding a run the following day. Espinosa told Reyes that he didn't take the particular run because it was a 12 to 14 hour work day for which he would not be adequately compensated. Espinosa also told Reyes that his truck had been in the shop at the time.

DiVirgilio, Reyes, and Espinosa then met, with Lauren Wojcik also present. DiVirgilio, Reyes, and Wojcik testified regarding this meeting. DiVirgilio and Reyes testified that DiVirgilio began the meeting by stating that Respondent was "going to proceed with termination for refusing to work." DiVirgilio testified that he told Espinosa that when Espinosa was directed to report to work or receive a write-up, he failed to report to work.[9] According to DiVirgilio, he told

[7] Southwell testified that "At some point" he asked Waldrip to "research past practice to see if we could confirm that," resulting in a written report, but it is clear from the testimony that Waldrip had not generated her report at the time of this meeting. Waldrip testified that she only began this research after the meeting with DiVirgilio and Southwell.

[8] Reyes was on light duty at the time, and was not driving as a result.

[9] DiVirgilio testified that in the context of Respondent's disciplinary processes the term "write-up" includes all types of disciplinary action, including discharge.

Espinosa that the failure to report to work "was the final straw and that is why the decision to terminate was made." DiVirgilio and Wojcik testified that Espinosa responded, protesting the decision was not fair, because he was dissatisfied with the pay for the run that he was being assigned.[10] DiVirgilio said that particularly given ongoing contract negotiations, the compensation for the run was not under consideration. DiVirgilio also told Espinosa that based upon the text messages, his understanding of the pay rate for the run he was being assigned was incorrect. DiVirgilio testified that Espinosa contended that drivers regularly refuse work at the dispatch window, and DiVirgilio asked him to provide proof of this, because in his understanding it occurred infrequently. Wojcik also testified that Espinosa said he had refused loads in the past and had not been disciplined as a result. According to Reyes and Wojcik, Espinosa stated that he was not afraid of being fired. Reyes and Espinosa then met privately, and DiVirgilio and Wojcik left the room. When they returned, DiVirgilio asked if there was anything else they wanted to raise, and when Reyes and Espinosa did not, DiVirgilio completed the Termination Notification (G.C. Ex. 2). DiVirgilio and Wojcik both testified that DiVirgilio completed the Comment portion of the Termination Notification at this time. Reyes and Espinosa signed the Notification under protest, and the meeting ended. DiVirgilio and Wojcik testified that Reyes did not challenge the decision to discharge Espinosa other than signing the termination notice under protest, and did not suggest any disciplinary alternative to discharge.

Reyes also testified regarding the meeting with DiVirgilio, Espinosa, and Wojcik. Reyes testified that after DiVirgilio opened the meeting by stating the reason for Espinosa's discharge, Reyes responded that the Union did not agree with the termination, and suggested that Espinosa be suspended instead. Reyes argued that Espinosa had been willing to take another load in lieu of the run that he had been assigned. According to Reyes, DiVirgilio responded that the termination was "already done." Reyes stated that he and Espinosa would sign the termination notice under protest, and pursue the matter with the Union. DiVirgilio made copies of the signed termination notice and brought them to Reyes and Espinosa.

On January 24, TGF and the Union met again regarding Espinosa's discharge. DiVirgilio, Southwell, and Pacheco attended this meeting for TGF, and Frederick Potter, Reyes, Union Court Division Representative Christina Montoria, and Espinosa attended for the Union. This meeting involved a substantial discussion between the parties regarding the distinction between refusal to work and requests for an alternative job assignment. Reyes and Espinosa both stated during this meeting that in the past they had turned down loads that they did not want, and had never been disciplined or discharged. DiVirgilio took the position that these incidents constituted requests for an alternative job assignment, which the company attempts to accommodate based upon the workload and the customers' needs.[11]

III. Analysis and Conclusions

A. TGF Was Obligated to Bargain with Local 469 Regarding Espinosa's Discharge

In *Alan Ritchey, Inc.,* 359 NLRB No. 40 (2012), the Board held that discretionary discipline is a mandatory subject of bargaining during the period between a union's certification and the existence of a first contract or interim grievance procedure. During this period, the

[10] Reyes testified that Espinosa spoke in broken English, and that Reyes translated for him as necessary, requesting at one point that the meeting pause so that he could discuss what was transpiring with Espinosa in Spanish. Wojcik could not recall Reyes translating for Espinosa.

[11] Reyes also testified that he saw the text messages pertaining to Espinosa's alleged refusal to work and no call/no show at this meeting.

employer is required to bargain regarding any "discretionary aspects" of discipline which have "an inevitable and immediate impact on employees' tenure, status, or earnings, such as suspension, demotion or discharge." *Alan Ritchey, Inc.,* 359 NLRB No. 40 at p. 8. In such cases, the employer is required, prior to imposing discipline, to provide the union with notice and the opportunity to bargain, consisting of "sufficient advance notice to the union to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen," to the extent that these issues are discretionary. *Id.* The Board specified, however, that the employer in such circumstances is not required to bargain to agreement or impasse prior to imposing discipline, but must continue to bargain afterwards. *Id.* The Board also stated that the employer has no duty to bargain over any aspect of the disciplinary decision which is consistent with past practice, and may act unilaterally in "exigent circumstances" involving a danger to its business or personnel. *Alan Ritchey, Inc.,* 359 NLRB No. 40 at p. 8-9.

General Counsel and TGF do not dispute that *Alan Ritchey, Inc.* is pertinent here. It is undisputed that the Union was certified as the exclusive collective bargaining representative on July 29, 2013, and that Imber Espinosa was a member of the bargaining unit. There is also no dispute that the Union and TGF have not reached agreement on a first contract, and that there is no interim grievance procedure established for the resolution of disciplinary disputes.

In addition, the evidence establishes that TGF's decision to discharge Espinosa was discretionary within the meaning of *Alan Ritchey, Inc.*, such that TGF was obligated to bargain. The evidence establishes that TGF's disciplinary policy afforded the company significant discretion in determining the nature of offenses subject to discipline and the appropriate penalty for misconduct. TGF's Employee Handbook contains a list of offenses which "may result in disciplinary action, up to and including termination of employment," and states that "There is no guarantee of any specific steps being followed and the severity of the conduct and the factual circumstances surrounding any violation will determine the appropriate disciplinary action." In *Alan Ritchey, Inc.,* the Board found that similar language evinced discretion in the employer's disciplinary policy. 359 NLRB No. 40 at p. 2-3, 10-11 (employee handbook provided that violations of policy "may result in disciplinary action," and stated that "Determination of appropriate action will be made on a case-by-case basis based on the nature and severity of the occurrence"). Indeed, DiVirgilio testified that within the context of TGF's disciplinary system, the term "write-up" could indicate any discipline from a written warning to a discharge (Tr. 50). The evidence regarding TGF's disciplinary policies therefore militates in favor of a finding that decisions to discharge employees are discretionary in nature.

Furthermore, the evidence does not establish that TGF had a past practice of discharging drivers for refusal to work which would eliminate any discretion from its decision to discharge Espinosa, and obviate the bargaining obligation pursuant to *Alan Ritchey, Inc.* Consonant with the Employee Handbook language discussed above, DiVirgilio testified that TGF reviews the specific facts and considers any mitigating circumstances when determining the appropriate level of discipline to impose for a refusal to work (Tr. 98-99). See *Alan Ritchey, Inc.,* 359 NLRB No. 40 at p. 3 (considering testimony of managers regarding evaluation of specific circumstances in the application of efficiency standards, attendance rules, and insubordination). Furthermore, the list of discharged employees prepared by Waldrip and admitted into evidence during the hearing does not establish that drivers were automatically or uniformly discharged for refusal to work (R.S. Ex. 4). Waldrip testified that the individuals whose names appeared on the list were only "inactive" employees, whose employment could have ceased due to either discharge or resignation (Tr. 191-192). The list also contained individuals who committed offenses other than refusing to work, such as refusal to take a mandatory drug test and refusal to follow orders (R.S. Ex. 4). In fact, a subsequent meeting

between the Union and TGF regarding Espinosa's discharge involved a substantial discussion regarding the distinction between refusal to work and, as DiVirgilio termed it, a request for an alternative job assignment, which TGF often accommodated.[12] This evidence simply does not demonstrate a past practice of non-discretionary discharge for a refusal to work which would eliminate TGF's bargaining obligation under *Alan Ritchey, Inc.*

For all of the foregoing reasons, the evidence establishes TGF was obligated pursuant to *Alan Ritchey, Inc.* to provide the Union with notice and the opportunity to bargain prior to Espinosa's discharge.

B. TGF Refused to Bargain in Good Faith with the Union Regarding Espinosa's Discharge by Presenting the Union with a Fait Accompli

General Counsel contends that TGF violated Sections 8(a)(1) and (5) of the Act by refusing to bargain in good faith prior to discharging Espinosa, in that it presented the Union with a *fait accompli* regarding the discharge, so that meaningful bargaining was precluded. General Counsel further claims that although the Union was not required to do so, Reyes attempted to bargain by proposing that Espinosa be suspended instead of discharged, and by contending that drivers had refused runs in the past with no disciplinary consequences. TGF argues that it engaged in bargaining with the Union regarding the discharge of Espinosa by conducting meetings and providing the Union with the opportunity to present countervailing information and arguments prior to the discharge. TGF further argues that it did not present the Union with a *fait accompli* simply by articulating Espinosa's discharge "as a fully developed plan" or by using "positive language to describe it." *Haddon Craftsmen*, 300 NLRB 789, 790 (1990), review denied 937 F.2d 597 (3rd Cir. 1991). TGF contends that when given the opportunity to do so, the Union did not bargain, but confirmed that Espinosa refused the load he was assigned because he did not like the run, which constituted long-standing grounds for discharge.

For the following reasons, the credible evidence establishes that TGF did in fact present the Union with a *fait accompli* regarding Espinosa's discharge, and that TGF therefore failed and refused to fulfill its obligation to bargain with the Union pursuant to *Alan Ritchey, Inc.* The credible evidence further establishes that Reyes and Espinosa attempted to negotiate with DiVirgilio during their interactions on January 16, and were told by DiVirgilio that the discharge was "already done." As a result, TGF violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with Local 469.

Section 8(d) of the Act requires that employers and bargaining representatives "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," which are mandatory subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Section 8(a)(5) provides that an employer's failure to do so violates the Act. An employer therefore violates Section 8(a)(5) when it makes a unilateral change in such terms and conditions of employment such as, in this context, the discretionary discharge of an employee. *NLRB v. Katz*, 369 U.S. 736, 742 (1962); *Alan Ritchey, Inc.*, *supra*.

[12] For example, shop steward Elliot Reyes testified that he had turned down runs on numerous occasions, and had never been discharged (Tr. 122-123, 130, 132-133). When Reyes raised this contention during the January 24 meeting, DiVirgilio took the position that Reyes had in fact been requesting an alternative job assignment, and not refusing to work (Tr. 207-208).

As a result, the Board has consistently found that "where the manner of the respondent's presentation of a change in terms and conditions of employment to the union precludes a meaningful opportunity for the union to bargain," the change constitutes a *fait accompli*, such that the union's failure to demand bargaining does not constitute a waiver. *Aggregate Industries*, 361 NLRB No. 80 (2014), 359 NLRB No. 156 at p. 4 (2013); see also *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). The obligation to bargain requires that the employer "at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals." *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986), quoting *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (1983) (citations omitted). Informing the union of a change in a manner which precludes meaningful bargaining divests the union of its obligation to demand bargaining or have inaction construed as a waiver. Id.

In order to determine whether the employer has presented the union with a *fait accompli*, the Board considers objective evidence regarding the presentation of the proposed change and the employer's decision-making process. *KGTV*, 355 NLRB No. 213 at p. 2-3 (2010) (union's "subjective impression of its bargaining partner's intention is insufficient" to establish *fait accompli*); *Bell Atlantic Corp.*, 336 NLRB 1076, 1087 (2001); *Haddon Craftsmen*, 300 NLRB at 700. While presenting a proposed change as a fully formulated plan or the use of positive language does not definitively establish a *fait accompli*, statements conveying an irrevocable decision constitute significant evidence that bargaining would be futile. See *Aggregate Industries*, 359 NLRB No. 156 at p. 5 (employer representative presented *fait accompli* by telling union representative that the employer was "going to" transfer bargaining unit employees); *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004) (employer presented *fait accompli* by telling union that layoff was a "done deal"); *Pontiac Osteopathic Hospital*, 336 NLRB at 1023-1024 (notice stating that changes "will be implemented" and other "unequivocal language" evidence of *fait accompli*). The Board also evaluates the timing of the employer's statements vis a vis the actual implementation of the change, the manner in which the change is presented, and other evidence pertinent to the existence of a "fixed intent" to make the change at issue which obviates the possibility of meaningful bargaining. *Aggregate Industries*, 359 NLRB No. 156 at p. 5; *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), enf'd. 722 F.2d 1120 (3rd Cir. 1983) ("if the notice is too short a time before implementation, or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*"); *Northwest Airport Inn*, 359 NLRB No. 83 at p. 4 (2013) (*fait accompli* established given owner's testimony that a decision to subcontract bargaining unit work had already been made and implemented, and union bargaining proposals regarding employee compensation "made no difference").

The evidence here demonstrates that Respondent presented Local 469 with a *fait accompli* with respect to Espinosa's discharge, such that meaningful bargaining was prevented, and the union did not waive its rights by a failure to demand bargaining. DiVirgilio's statements regarding the discharge, the evidence regarding the process by which the decision to discharge Espinosa was made, and the credible evidence regarding the interactions between DiVirgilio and Reyes all establish that TGF presented the Union with a *fait accompli*, such that meaningful bargaining between the parties was impossible.

Central to this conclusion are my findings with respect to the relative credibility of the witnesses, in particular Reyes and DiVirgilio. A credibility determination requires a consideration of the witness' testimony in context, encompassing the witness' demeanor, "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D Construction Group*, 339 NLRB 303, 305 (2003). It is common for a finder of fact to credit some but not all of a particular

witness' testimony. *Daikichi Sushi*, 335 NLRB 622 (2001), enf'd. 56 Fed. Appx. 516 (D.C. Cir. 2003). This is particularly the case where the credited portions of the witness' testimony are "consistent with the testimony of credited witnesses or with documentary evidence," constitute an admission against interest, or are relied upon by the party against which a particular issue is being resolved. *Upper Great Lakes Pilots*, 311 NLRB 131, fn. 2 (1993). For the reasons discussed in detail below, I find that DiVirgilio was not a particularly credible witness. As a result, I have generally credited his testimony only where it constitutes an admission against interest, or is consistent with documentary evidence or the testimony of more credible witnesses.

The evidence therefore establishes that DiVirgilio's statements to Reyes on January 16 during their initial telephone conversation, their initial meeting, and their meeting which was also attended by Espinosa and Wojcik presented the Union with a *fait accompli* regarding Espinosa's discharge. DiVirgilio admitted that when he initially called Reyes, he "let [Reyes] know that we were going to terminate [Espinosa] for refusal to work" (Tr. 48). Similarly, DiVirgilio admitted that during his initial meeting with Reyes, he stated to Reyes that "Espinosa had refused to work and that was Toll's reason for proceeding with termination" (Tr. 49). DiVirgilio also admitted that "at the beginning" of his meeting with Reyes, Espinosa, and Wojcik, he "let Mr. Espinosa know that Toll was going to proceed with termination for refusing to work" (Tr. 50). He went on during this meeting to characterize Espinosa's failure to report to work after being told that "a write-up" would ensue as "the final straw," and stated, "that is why the decision to terminate was made" (Tr. 50). None of these statements are equivocal, or are susceptible to an interpretation that the matter was still unresolved or negotiable.[13] Instead, they conveyed the impression that a final decision had been reached and all that remained was its mechanical implementation, and thereby presented Local 469 with a *fait accompli*. See *Aggregate Industries*, 359 NLRB No. 156 at p. 5 (*fait accompli* presented via statement that employer was "going to" transfer bargaining unit employees); *Pontiac Osteopathic Hospital*, 336 NLRB at 1023-1024 (notice stating that changes "will be implemented" and other "unequivocal language" constituted *fait accompli*).

I further discredit DiVirgilio's elaborative testimony regarding these admissions, and find that his attempts to obfuscate the admissions contained in his affidavit undermine his credibility overall. For example, when questioned regarding his telephone conversation with Reyes, DiVirgilio refused to simply admit that he told Reyes that TGF was going to discharge Espinosa, claiming, that "Initially I explained to him very briefly, I explained to him that he needed to come into the office to meet with the driver who had refused work and caused a termination" (Tr. 47). Asked again whether he told Reyes that TGF was going to discharge Espinosa for refusal to work, DiVirgilio answered, "Not definitively I did not, no" (Tr. 47). Asked a third time, DiVirgilio responded:

> We were going to terminate him? I don't believe I used it in that manner, no. The way that it sounds, it doesn't sound as definitive as the conversation was to me as a – I don't think it was a more formal conversation and I let him know that it's a terminal offense that we're taking as a serious matter. That's why he needed to come in and discuss it.

[13] Nor are they in any way conditional. As a result, TGF's argument in its Post-Hearing Brief that the position DiVirgilio presented to the Union was "if Mr. Espinosa had actually refused work as he stated in his text messages than he would be terminated" is not consistent with the credible evidence. Post-hearing Brief for Respondent at 22.

Tr. 47. Finally, after being confronted with his affidavit, DiVirgilio admitted that during the telephone conversation with Reyes, he "let [Reyes] know that we were going to terminate [Espinosa] for refusal to work" (Tr. 48). Even then, however, DiVirgilio attempted to confound the plain language of his affidavit with the dubious rejoinder, "I think it's interpreted a little bit different from the initial intent of the conversation" (Tr. 48).[14]

DiVirgilio attempted to obscure the straightforward statements contained in his sworn account of the meeting with Reyes, Espinosa, and Wojcik in a similar manner:

> Q: And you concede that at the beginning of the meeting when Imber Espinosa was present you told him that you were going to proceed with termination for refusing work, is that correct?
>
> A: That's correct.
>
> Q: And you concede that you told him that the decision to terminate had been made, is that correct?
>
> A: I don't believe so, no.
>
> Q: Well, you said – in your statement – let me show you this.
>
> ***
>
> Q: BY MS LEVY: Look at Page 5, Line 4. This is your statement under penalty of perjury, correct?
>
> A: Well, I felt I had to explain to the employee why he was in my office.
>
> Q: Right. Are those your words –
>
> A: Those are my words.
>
> Q: That you communicated to Mr. Espinosa?
>
> A: Absolutely, they are.
>
> Q: "I told him that we did not have another driver to assign the run to. I explained to him that that affects the operations negatively. Despite those two circumstances when he was told to report to work or there would be a write-up he

[14] I also find Reyes' testimony regarding the timing of this conversation more credible than DiVirgilio's. Reyes testified that DiVirgilio called him shortly after 10 a.m., pinpointing the time based upon the start of a television program he was watching in the lounge while on light duty work (Tr. 114-115). This testimony is more detailed and plausible than DiVirgilio's claim that he called Reyes some time between 8 a.m. and 9 a.m., and that Reyes was at home at the time (Tr. 46). I also note that later in his testimony DiVirgilio contended that he initially called Reyes between 9:30 and 10 a.m. (Tr. 109).

did not report to work. To us that was the final straw and that is why the decision to terminate him was made."[15]

Is that accurate?

A: Yes

Tr. 96-97. DiVirgilio's repeated attempts to occlude the unambiguous admissions contained in his affidavit enhance the reliability of the admissions themselves, and cast doubt upon the overall veracity of his positive testimony.

I also find that the credible evidence establishes that TGF had made a definitive decision to discharge Espinosa prior to DiVirgilio's initial telephone conversation with Reyes. The evidence establishes that prior to calling Reyes, DiVirgilio had spoken to the dispatchers and reviewed the text messages between the dispatchers and Espinosa.[16] DiVirgilio testified that his conversations with the dispatchers and the review of their text messages constituted his entire investigation into the matter, which was concluded prior to his discussion with Pacheco regarding Espinosa's termination (Tr. 95-96).[17] He further admitted that when he called Pacheco, he described Espinosa's conduct and told Pacheco that in his opinion, "we should proceed with termination," and Pacheco agreed (Tr. 43, 44-45).[18] The evidence overall demonstrates that this constituted TGF's decision to discharge Espinosa. DiVirgilio's temporizing that when he initially recommended discharge Pacheco told him "to investigate the matter and confirm that that's our past practice" is patently incredible given his later admission that his investigation was complete prior to the conversation with Pacheco (Tr. 44-45, 95-96). His testimony that when Pacheco told him to "start the meeting process with shop steward Elliott Reyes and Imber Espinosa," Pacheco was referring only to an investigation, and not to the effectuation of a final determination to discharge Espinosa, is implausible for similar reasons (Tr. 45).

Nor is the credible evidence regarding DiVirgilio's meeting with Southwell and Waldrip, which also took place prior to DiVirgilio's initial call to Reyes, inconsistent with the conclusion

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[15] When DiVirgilio was questioned by Respondent's counsel, he transformed this statement from his affidavit into "We felt that he was refusing work on a few occasions and that we felt that it was a terminable offense" (Tr. 79).

[16] It should be noted that the record contains number of discrepancies regarding Espinosa's alleged refusal to work in and of itself. For example, DiVirgilio testified that the dispatchers informed him that Espinosa had failed to report to work on January 14, 15, or 16 (Tr. 38-39). He later testified that Drew informed him that Espinosa refused a work assignment on January 15 to 16 (Tr. 41), and the termination notice DiVirgilio ultimately prepared states "Refusal to work on 1/16/14 no call/no show 1/15/14" (G.C. Ex. 2). Waldrip and Southwell both testified that DiVirgilio told them that Espinosa had refused to work for "two days in a row," and, during a phone call with Southwell, "on several occasions" (Tr. 174, 184-185, 221-222). However, Drew's text message to Espinosa on January 15 only states that if Espinosa did not show up at 5 a.m. on January 16, "I will consider this a refusal by you to work tomorrow" and "you will be written up for refusing work" (R.S. Ex. 1). And in fact, on January 16 Espinosa was called in to be discharged.

[17] Southwell testified that DiVirgilio informed him by phone that Espinosa "had refused to do work on several occasions and had refused to show up as instructed" and that "most of this was done through text messaging with the two different dispatchers" (Tr. 222).

[18] DiVirgilio apparently does not have authority to discharge an employee, but can make a recommendation that TGF do so (Tr. 94). Southwell testified that DiVirgilio's disciplinary recommendations are "almost always followed" (Tr. 225-226).

that DiVirgilio presented the Union with a *fait accompli*. DiVirgilio described this meeting as "brief and informal" (Tr. 46-47), and Southwell testified that it occurred "coincidentally," because he and DiVirgilio happened to be in the same area at the same time (Tr. 223).[19] Thus, DiVirgilio described Espinosa's conduct to Southwell and Waldrip, and told them that Pacheco had agreed with his recommendation to discharge Espinosa. According to DiVirgilio and Southwell, everyone present believed that discharge was appropriate (Tr. 45-46, 224-225).[20] Thus, the credible testimony regarding this meeting further supports the conclusion that Respondent had made a definitive decision to discharge Espinosa prior to DiVirgilio's calling Reyes and telling him that Respondent was "going to terminate [Espinosa] for refusal to work."

The credibility resolutions following from DiVirgilio's repeated attempts to evade the plain admissions in his affidavit and other inconsistencies result in evidentiary findings which further illustrate that TGF presented the Union with a *fait accompli* regarding Espinosa's discharge, and rejected any efforts by the Union to engage in bargaining. Given DiVirgilio's overall lack of reliability as a witness, I find Reyes' account of their initial meeting in DiVirgilio's office the more credible.[21] As discussed above, DiVirgilio admittedly told Reyes during this meeting that "Espinosa had refused to work and that was Toll's reason for proceeding with termination," a statement presenting the decision as a *fait accompli*. Given the credibility considerations, I find in addition that Reyes asked DiVirgilio during this meeting whether TGF would consider suspending Espinosa instead of terminating him (Tr. 137-138). I further credit Reyes' testimony that DiVirgilio showed him Espinosa's Termination Notification with handwritten material – "Refusal to work on 1/16/14, no call/no show on 1/15/14" – in the Comments section (Tr. 118).[22] I also find that DiVirgilio did not discuss the text messages between Espinosa and the dispatchers (Tr. 119). Finally, I credit Reyes' testimony that he did not tell DiVirgilio that he understood or agreed with Respondent's reasons for discharging Espinosa (Tr. 119). In addition to the unreliability of DiVirgilio's testimony generally, I find it implausible that Reyes, a trained union shop steward with 14 years of experience in that capacity,[23] would immediately agree that the company's asserted reasons for a discharge were valid in an initial meeting with management.

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[19] Southwell confirmed that the meeting was "Probably no more than 5 minutes" (Tr. 223).

[20] Waldrip testified that she did not recall agreeing that Espinosa should be discharged during this meeting, only telling DiVirgilio and Southwell that in the past TGF had terminated employees for refusing to work (Tr. 175, 184-185). Although Waldrip contended that to her knowledge every employee who had refused work had been terminated, the list that she later prepared does not unequivocally demonstrate as much, and she did not have personal knowledge of the circumstances surrounding the discharge of every employee purportedly terminated for this reason (R.S. Ex. 4, Tr. 180-181).

[21] General Counsel argues that as a current employee who testified against his own pecuniary interests, Reyes' testimony should be considered particularly reliable under relevant Board case law. See, e.g., *Dodge of Naperville*, 357 NLRB No. 183 at p. 13-14, n. 13 (2012); *Flexsteel Industries*, 316 NLRB 745 (1995), enf'd., 83 F.3d 419 (5th Cir. 1996). However, Reyes is also a Union shop steward, and was testifying regarding events which took place while he was acting in that capacity. As a result, I find that his testimony is more analogous to that of an alleged discriminatee, and have not afforded it a heightened level of credibility pursuant to this theory. *PPG Aerospace Industries*, 355 NLRB No. 18, at p. 2, fn. 7 (2010); *Grand Central Partnership*, 327 NLRB 966, 969 (1999).

[22] Lauren Wojcik's testimony that DiVirgilio completed this portion of the Termination Notification at the meeting she attended will be addressed *infra*.

[23] Although Reyes became a shop steward with Local 469 at TGF in September or October 2013, he testified that had been a shop steward for about 14 years at a previous job, and had received training (Tr. 113, 141, 162-163).

Nor does the credible evidence establish that Respondent provided the Union with anything other than a *fait accompli* at DiVirgilio's subsequent meeting with Reyes, Espinosa, and Wojcik. As discussed above, the evidence establishes that DiVirgilio began this meeting by informing Espinosa and Reyes that Respondent was "going to proceed with termination for refusing to work," and that Espinosa "did not report to work" in "those two circumstances when he was told to report to work or there would be a write-up," which constituted "the final straw and that is why the decision to terminate him was made." Given DiVirgilio's lack of credibility with respect to his own statements during this meeting, I credit Reyes' testimony that he told DiVirgilio that the Union did not agree with the discharge penalty, and that he suggested that Espinosa be suspended instead, to which DiVirgilio responded that "the termination was already done" (Tr. 120-121).[24] I further credit Reyes' testimony that he argued that Espinosa had not in fact refused to work, because he had been willing to take another load (Tr. 142). In addition, according to DiVirgilio and Wojcik, Espinosa contended that other drivers, including himself, had refused work in the past without disciplinary consequences (Tr. 80-81, 202-203). Thus, the credible evidence establishes that any attempt by the Union to negotiate the appropriate penalty, discuss whether Espinosa had committed the alleged misconduct, or raise past instances of refusal to work which did not result in discharge was rebuffed by DiVirgilio. This evidence supports a finding that TGF, in the person of DiVirgilio, presented Reyes with a *fait accompli* with respect to Espinosa's discharge, and disregarded any attempt by the Union to negotiate the level of discipline or raise evidence suggesting that discharge was unwarranted.

I also decline to draw an adverse inference because General Counsel did not call Espinosa as a witness regarding this meeting, as Respondent suggests. As the employee who was discharged, I find that Espinosa cannot be considered a "bystander" whose testimony could not be presumed to favor one party or the other. See *Spurlino Materials, LLC*, 357 NLRB No. 126 at p. 12 (2011). As a result, an adverse inference may be taken in the absence of any explanation regarding the failure to call him. Id. However, it is also doubtful that Espinosa's version of the events of this meeting would have contradicted DiVirgilio's critical admissions that he told Reyes and Espinosa at its inception that Respondent was "going to proceed with termination for refusing to work," and that Espinosa's failure "to report to work" in "those two circumstances when he was told to report to work or there would be a write-up," constituted "the final straw" resulting in TGF's decision to discharge him. In addition, based upon Wojcik and DiVirgilio's testimony, it appears that Espinosa would have testified that he argued that other drivers, he himself included, had in the past refused loads without any disciplinary consequences. Thus, I do not find that any failure on Espinosa's part to corroborate Reyes' account of his own statements at the meeting would materially affect the conclusion that DiVirgilio presented the Union with a *fait accompli* in this context.

Finally, the evidence here does not establish a lack of due diligence on the part of the Union in terms of making a bargaining demand. Cases finding a lack of due diligence typically involve delays of weeks between the announcement and implementation of a change in terms

[24] I am mindful of Wojcik's testimony that, to the best of her recollection, Reyes did not say anything during this meeting until he asked to review the termination notice privately with Espinosa, and subsequently told DiVirgilio that he would only sign the notice under protest (Tr. 197-199, 204). However, Wojcik also could not recall DiVirgilio's admitted statements at the beginning of the meeting, and could recall only that DiVirgilio told Espinosa during the meeting that he was being terminated because he could not refuse work (Tr. 200-201, 202-203). I therefore ultimately find that Wojcik's recollection regarding the meeting was incomplete, and credit Reyes on these particular points. Because Reyes' more detailed account evinces a superior recollection, I also do not credit Wojcik's testimony that DiVirgilio only completed the Comments portion of the Termination Notice at this meeting (Tr. 199).

and conditions of employment, so that the Union has ample time to demand bargaining and fails or even affirmatively declines to do so. See *KGTV*, 355 NLRB No. 213 at p. 2-3 (evidence established that union decided against bargaining, although layoff notice issued 3 weeks in advance of implementation date); *Bell Atlantic Corp.*, 336 NLRB at 1086-1087 (no *fait accompli* established where employer's plan for movement of work would not be implemented for six months, and issue was referred to union-management forum "to develop alternatives" to such changes); *Haddon Craftsmen*, 300 NLRB at 790 (union failed to demand bargaining despite 5-6 weeks' notice of change's implementation); and see *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25 at p. 2-3 (2011), enf'd. in relevant part, 701 F.3d 710 (D.C. Cir. 2012) (3-week delay in bargaining demand constitutes due diligence, where demand took place "well in advance of…implementation date" and union required legal advice regarding proposed change). In this case, by contrast, the interactions between employer and union consisted of a telephone call and two meetings over the course of an hour or two. Therefore, the record would not support a conclusion that the Union failed to exercise due diligence in invoking the bargaining obligation, even in the absence of credible evidence that the Union attempted to negotiate by proposing a suspension and to raise evidentiary issues by challenging the consistent imposition of discharge as a penalty for refusal to work.

For all of the foregoing reasons, I find that Respondent refused to bargain with the Union regarding Espinosa's discharge despite its obligation to do so under *Alan Ritchey, Inc.*, in violation of Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. The Respondent, TGF Management Group Holdco, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters Local 469, is a labor organization within the meaning of Section 2(5) of the Act.

3. Since July 29, 2013, Local 469 has been the certified exclusive collective bargaining representative of the employees in the following unit:

> All full-time and regular part-time Long-Haul Drivers, Truck Drivers and Switchers employed by the Employer at its Carteret, New Jersey facility, but excluding all Office Clerical employees, Managers, Guards and Supervisors as defined in the Act, and all other employees.

4. By discharging Imber Espinosa on January 16, 2014 without providing Local 469 with notice and the opportunity to bargain, TGF violated Sections 8(a)(1) and (5) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that TGF has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that TGF discharged Imber Espinosa without providing the Union with notice and the opportunity to bargain, TGF will be ordered to bargain in good faith regarding the decision to discharge Espinosa, reinstate Espinosa, and make Espinosa whole for any loss of

pay or other benefits suffered as a result of the unlawful layoff. The make whole remedy shall be computed on a quarterly basis from the date of the discharge to the until such time as the parties engage in good faith bargaining, less any net interim earnings, in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest pursuant to *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), *enf. denied on other grounds, 647 F.3d 1137* (D.C. Cir. 2011). Respondent shall reimburse to Espinosa an amount equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had Espinosa not been discharged, and shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. *Latino Express, Inc.*, 359 NLRB No. 44 (2012). Respondent shall also be required to remove from its files all references to Espinosa's unlawful discharge, and to notify him in writing that this has been done and that the discharge shall not be used against him. Finally, Respondent shall be ordered to post a notice, informing its employees of its obligations herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The Respondent, TGF Management Group Holdco, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Imposing serious discipline, including discharge, upon bargaining unit employees without first affording the Union an opportunity to bargain in good faith regarding the discipline to be imposed.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Rescind the discharge of Imber Espinosa.

(b) Notify the Union and provide it with an opportunity to bargain regarding any discipline that may be imposed for Imber Espinosa's conduct on January 14, 15, and 16, 2014.

(c) Within 14 days of this Order, reinstate Imber Espinosa to his previous job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make whole Imber Espinosa for any loss of pay or other employment benefits suffered as a result of its unlawful conduct, in the manner set forth in the Remedy portion of this Decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Imber Espinosa on January 16, 2014, and within 3 days thereafter notify Espinosa in writing that this has been done and that the discharge will not be used against him in any way. This does not prevent Respondent from disciplining or discharging Espinosa after

providing the Union with notice and the opportunity to bargain over any discipline that may be imposed, as required pursuant to Section 8(a)(1) and (5) of the Act.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy or such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post its Carteret, New Jersey facility copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 16, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, DC January 15, 2015

_____

Lauren Esposito
Administrative Law Judge

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT impose serious discipline upon you, such as discharge, suspension, or demotion, without first providing your union, International Brotherhood of Teamsters, Local 469, with notice and the opportunity to bargain about the discipline.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL rescind the January 16, 2014 discharge of Imber Espinosa.

WE WILL within 14 days of the date of the Board's Order, offer Imber Espinosa reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Imber Espinosa whole for any loss of earnings and other benefits suffered as a result of his January 16, 2014 discharge, less any net interim earnings, plus interest compounded daily.

WE WILL within 14 days of the date of this Order, remove from our files any reference to the January 16, 2014 discharge of Imber Espinosa. However, this does not prevent us from imposing discipline after notifying the Union and providing it with an opportunity to bargain over that discipline.

WE WILL within 3 days thereafter, notify Imber Espinosa in writing that this has been done and that the January 16, 2014 discharge will not be used against him in any way, except that if discipline is lawfully imposed after giving the Union notice and an opportunity to bargain, records of such discipline may be kept in our files.

TGF Management Group Holdco, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-123003 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.